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# California Law Review

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## Judicial Review of Exceptions from the Referendum<sup>1</sup>

UNDER constitutions that permit the people of the states to apply the referendum to acts of the legislature, the legislature may except from the power of the referendum laws enacted in case of "emergency," laws "necessary for the immediate preservation of the public peace, health, or safety," etc., and laws concerning such specific subjects as "appropriations," etc.; and certain specific subjects such as the regulation of "taxation or exemption," etc., are made always subject to the referendum. These provisions for exception are variously combined. "The vital question is, what tribunal is to determine whether a law does or does not fall under . . . [the given] classification?"<sup>2</sup>

Where the classification is specific, the answer has caused no difficulty, and in all cases coming before the courts they have not hesitated to review the legislative determination as, apparently, purely a question of law, irrespectively of their attitude toward the more general limitations. "Though it may deem an act which is an 'infringement of the right of home rule for municipalities' to be immediately necessary, the legislature is forbidden by the positive mandate of the constitution to give it immediate effect. Whether a given act is such an infringement is a judicial question."<sup>3</sup> "The only reasonable conclusion is that such an appropriation is not for the 'usual current expenses of the state.' The said legislative declaration has no greater effect, and is no more binding upon the court, than if the legislature had declared that a

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<sup>1</sup> Cf. 7 A. L. R. 519-33 (1919).

<sup>2</sup> Kadderly v. Portland (1903-4) 44 Ore. 118, 147, 74 Pac. 710, 75 Pac. 222.

<sup>3</sup> Payne v. Graham (1919) 118 Me. 25, 107 Atl. 709.

certain measure is or is not constitutional. . . . The question before us is simply one of construction or interpretation of an act of the legislature and of a provision of the constitution, and that is a judicial question."<sup>4</sup>

But the distinction between the special and the general limitation is only a matter of *degree* ("most differences are, when nicely analyzed"),<sup>5</sup> and this is, to some extent, the cause for the disagreement among the courts in their consideration of the more general limitations. In fact, courts at times consider together the two classes of limitations without noting any difference between them significant in this connection; and it has even been expressly urged that the same principle applies to both.<sup>6</sup> This is the implication in all decisions favoring review in case of this more general limitation.

However, there has been much confusion among the courts of the several jurisdictions and even of the same jurisdiction where the more general limitations have been considered, with the result that at present in five jurisdictions the courts will review the legislative determination that a law is necessary for "the immediate preservation of the public peace, health, or safety," etc.,<sup>7</sup> in

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<sup>4</sup> McClure v. Nye (1913) 22 Cal. App. 248, 133 Pac. 1145, 1147. See also Oklahoma City v. Shields (1908) 22 Okla. 265, 100 Pac. 559, 576; In re Meneefee (1908) 22 Okla. 365, 97 Pac. 1014, 1018; Riley v. Carrico (1910) 27 Okla. 33, 110 Pac. 738, 740; State v. Clausen (1915) 85 Wash. 260, 148 Pac. 28; Gayman v. Mullen (1916) 58 Okla. 477, 161 Pac. 1051, 1054; Lemaire v. Crockett (1917) 116 Me. 263, 101 Atl. 302; State v. Howell (1919) 106 Wash. 535, 181 Pac. 37, 39; Strange v. Levy (1919) 134 Md. 645, 107 Atl. 549; State v. Taylor (1920) 43 S. D. 166, 178 N. W. 985, 986.

<sup>5</sup> Rideout v. Knox (1889) 148 Mass. 368, 19 N. E. 390, 392, in another connection.

<sup>6</sup> Scott, J., dissenting, Van Fleeck v. Ramer (1916) 62 Colo. 4, 156 Pac. 1108, 1115. Cf. State v. Meath (1915) 84 Wash. 302, 147 Pac. 11, 17.

<sup>7</sup> In re Hoffman (1909) 155 Cal. 114, 99 Pac. 517, 519, overruled; Attorney General v. Lindsay (1914) 178 Mich. 524, 145 N. W. 98; State v. Meath (1915) 84 Wash. 302, 147 Pac. 11, 12; State v. Howell (1915) 85 Wash. 281, 147 Pac. 1162 1163; State v. Howell (1915) 85 Wash. 294, 147 Pac. 1159; Miami County v. Dayton (1915) 92 Ohio St. 215, 110 N. E. 726, 728; Rigdon v. San Diego (1916) 30 Cal. App. 107, 157 Pac. 513, 515, overruled; State v. Howell (1919) 106 Wash. 542, 181 Pac. 37, 39; State v. Stewart (1920) 57 Mont. 144, 187 Pac. 641; State v. Sullivan (1920) 224 S. W. (Mo.) 327, 337; State v. Hinkel (1921) 198 Pac. (Wash.) 535; State v. Smith (1921) 133 N. E. (Ohio) 457; State v. Smith (1921) 133 N. E. (Ohio) 480; State v. Becker (1921) 233 S. W. (Mo.) 641, 644. Cf. Payne v. Graham (1919) 118 Me. 251, 107 Atl. 709, 710. The leading case is State v. Meath.

five jurisdictions they will not review such determination;<sup>8</sup> and in one jurisdiction a compromise solution has been reached.<sup>9</sup>

The question here is only one phase of the general question as to the power of the courts to control legislative discretion in the application of constitutional limitations. "Courts have never refused to review acts of the legislature in the exercise of a discretion, unless it explicitly appears that the grant of such discretions was exclusive. . . . This case is no other or different from any other case which involves constitutional construction, and it must be decided upon well-known principles of law and the application of the ordinary rules of such construction."<sup>10</sup> However, as a matter of fact, in other questions involving the review of legislative discretion it has long been apparent that the courts have been wholly unable to find any general principle for their practical guidance, but have become absolutely confused in a bewildering mass of conflicting decisions. No such principle exists. The only logically consistent position possible—however politically untenable—is either to review discretion in all cases, or to review it in none, subject, of course, to explicit constitutional indication of the final authority.

In the absence of such explicit constitutional indication<sup>11</sup> three doctrines have been developed by the courts in regard to the question in hand—one that it is a question of fact, a political question, for final determination by the legislature; another that, whether a question of fact or of law or of both, it is a question

<sup>8</sup> *State v. Bacon* (1901) 14 S. D. 394, 85, N. W. 605, 608, overruled; *Kadderly v. Portland* (1903-4); 44 Ore. 118, 146, 74 Pac. 710, 75 Pac. 222; *Dallas v. Hallock* (1904) 44 Ore. 246, 258, 75 Pac. 204; *Oklahoma City v. Shields* (1908) 22 Okla. 265, 100 Pac. 559, 563, 574; *In re Menefee* (1908) 22 Okla. 365, 97 Pac. 1014, 1018; *State v. Cochran* (1909) 55 Ore. 157, 194, 104 Pac. 419, 105 Pac. 884; *Brown v. State* (1910) 3 Okla. Cr. App. 442, 106 Pac. 975; *Bennett Trust Co. v. Sengstacken* (1911) 58 Ore. 333, 342, 113 Pac. 863; *State v. Moore* (1912) 103 Ark. 487, 145 S. W. 199, 201; *In re Senate Resolution*, No. 4, (1913) 54 Colo. 262, 130 Pac. 333, 336; *McClure v. Nye* (1913) 22 Cal. App. 248, 133 Pac. 1145, 1147; *Hanson v. Hodges* (1913) 109 Ark. 479, 160 S. W. 392; *Van Kleeck v. Ramer* (1916) 62 Colo. 4, 156 Pac. 1108, 1110; *Ex parte McDermott* (1919) 180 Cal. 783, 183 Pac. 437. Cf. *Payne v. Graham* (1919) 118 Me. 251, 107 Atl. 709, 710. The leading case is *Kadderly v. Portland*.

<sup>9</sup> *State v. Whisman* (1920) 36 S. D. 260, 154 N. W. 707, 711; *Hodges v. Snyder* (1920) 43 S. D. 166, 178 N. W. 575, 577; *State v. Taylor* (1920) 43 S. D. 264, 178 N. W. 985. The leading case is *Hodges v. Snyder*.

<sup>10</sup> *McAlvay, C. J., Attorney General v. Lindsay* (1914) 178 Mich. 524, 145 N. W. 98, 100.

<sup>11</sup> "In all other cases where a general law can be made applicable, no local or special law shall be enacted; and whether a general law could have been made applicable in any case is hereby declared a judicial question, and as such shall be judicially determined without regard to any legislative assertion on that subject." Mo. Const., § 53 (1875).

for final determination by the courts; and a third, that it is a mixed question of law and fact, partly for final determination by the courts and partly for final determination by the legislature.

"As the amendment does not declare what shall be deemed laws of the [urgent] character indicated, who is to decide whether a specific act may or may not be necessary for the purpose? Most unquestionably, those who make the laws are required, in the process of their enactment, to pass upon all questions of expediency and necessity connected therewith, and must therefore determine whether a given law is necessary for the preservation of the public peace, health, and safety. It has always been the rule, and is now everywhere understood, that the judgment of the legislative and executive departments as to the wisdom, expediency, or necessity of any given law is conclusive on the courts, and cannot be reviewed or called in question by them. It is the duty of the courts, after a law has been enacted, to determine in a proper proceeding whether it conflicts with the fundamental law, and to construe and interpret it so as to ascertain the rights of the parties litigant. The powers of the courts do not extend to the mere question of expediency or necessity. . . . The amendment excepts such law as may be necessary for a certain purpose. The existence of such necessity is therefore a question of fact, and the authority to determine such fact must rest somewhere. The constitution does not confer it upon any tribunal. It must therefore necessarily reside with the department of the government which is called upon to exercise the power. It is a question of which the legislature alone must be the judge, and when it decides the fact to exist, its action is final."<sup>12</sup> "The members of the legislature are elected to determine these questions. They have committees that hold hearings and otherwise receive information which may not be accessible to the court. Its members may have reasons for passing many acts and the necessity for their immediate enforcement, which the courts never hear of."<sup>13</sup>

A distinction in principle is thus made between the determination of the constitutionality of a law on the one hand and the

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<sup>12</sup> *Kadderly v. Portland* (1903-4) 44 Ore. 118, 148, 74 Pac. 710, 75 Pac. 222.

<sup>13</sup> *Hill, J., Van Kleeck v. Ramer* (1916) 62 Colo. 4, 156 Pac. 1108, 1112, 1113. See also *Van Kleeck v. Ramer* (1916) 62 Colo. 4, 156 Pac. 1108, 1110; *State v. Bacon* (1901) 14 S. D. 394, 85 N. W. 605, 608; *Oklahoma City v. Shields* (1908) 22 Okla. 265, 100 Pac. 559, 574; *State v. Moore* (1912) 103 Ark. 487, 145 S. W. 199, 201; *Hanson v. Hodges* (1913) 109 Ark. 479, 160 S. W. 392, 394; *Roanoke v. Elliott* (1918) 123 Va. 393, 96 S. E. 819, 822; dissenting opinion, *State v. Meath* (1915) 84 Wash. 302, 147 Pac. 11, 18.

determination of the validity of an exception from the referendum on the other. "The fact that the courts decide whether a law is constitutional has no application to this question, that is purely a legal question to be decided from the language of the constitution and the act claimed to be in conflict with it. The necessity for a law is a matter of opinion. . . . Whether a law is necessary for the immediate preservation of the public peace, health, or safety, and for any of these reasons should take effect at once, involves questions of fact, which will likewise create a diversity of opinion. The members of the legislature are elected to determine these questions."<sup>14</sup>

But courts that review the legislative exception tend to regard the question of the validity of the exception and the question of the constitutionality of a law as involving exactly the same principles. "The judicial aversion to a review of legislative discretion in so far as it relates to emergency clauses, is no more thoroughly established than the equivalent declaration that courts have power to declare laws unconstitutional. Now there is no more reason for saying that a bill is an emergent measure, when upon its face it is not, and from the very nature of its subject-matter cannot be, just because the legislature has said it is so, than there is for declaring a law to be unconstitutional when it has been passed by the legislature with the constitution and its limitations lying open before it. The sense and discretion of the legislature, as well as its power to discriminate between an act falling clearly without and one falling clearly within the constitution, should, if we are consistent, be given the same weight as a declaration that an act is emergent."<sup>15</sup>

Although the question may be considered one of fact and the authority to determine the fact must rest "somewhere," it does not necessarily follow that it must rest with the legislature. "If this reasoning were sound," it is said, "it would apply with equal force to questions arising as to whether acts were in violation of the state constitution. . . . The facts are controlling, and not the

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<sup>14</sup> Hill, J., *Van Kleeck v. Ramer* (1916) 62 Colo. 4, 156 Pac. 1108, 1113. See also Fullerton, J., dissenting, *State v. Clausen* (1915) 85 Wash. 260, 148 Pac. 28, 33, 34. Cf. *Payne v. Graham* (1919) 118 Me. 251, 107 Atl. 709, 710.

<sup>15</sup> *State v. Meath* (1915) 84 Wash. 302, 147 Pac. 11, 13. See also *Ex parte Hoffman* (1909) 155 Cal. 114, 99 Pac. 517, 519; *State v. Sullivan* (1920) 224 S. W. (Mo.) 327, 337; *Blair, C. J., State v. Becker* (1921) 233 S. W. (Mo.) 641, 650; *Scott, J., dissenting, Van Kleeck v. Ramer* (1916) 62 Colo. 4, 156 Pac. 1108, 1115, 1116; *Johnson, J., dissenting, State v. Smith* (1921) 133 N. E. (Ohio) 457, 469, 473.

declaration of the legislature, which, unsupported by facts shown, amounts to nothing more than a legal conclusion."<sup>16</sup>

As to the difficulty of the courts' getting at the facts necessary for review of legislative action in emergency causes, it has been urged that no greater difficulty is likely to be presented here than is presented when courts "pass upon questions of fact in determining whether police regulations are valid or invalid."<sup>17</sup> But especially under a strict application of the doctrine of the inadmissibility of extrinsic evidence in the determination of the validity of legislation, discussed below, the courts are certainly at a disadvantage.

The startling results of a logically consistent application of the doctrine of judicial review have been considered good ground for its rejection. "If the inclusion of the peace, health and safety clause in an act is . . . conclusive upon the courts, then the result is that . . . [the referendum provision] empowers the legislative assembly to widen and extend the police power to include callings and regulations to which it could not have been extended prior to the adoption of . . . [the referendum provision], and this by the simple use of a form of words in acts it passed without regard to the character of the regulation, and despite the fact that the regulation is concededly unconstitutional, had not the peace, health, and safety clause been included in the act imposing it. It would enable the legislative assembly to remove from the realm of judicial questions every question of fact . . . [bearing upon the validity of police regulations], and thereby largely revolutionize the law concerning the scope and extent of the police power."<sup>18</sup> And, logically, this applies to the federal as well as to the state constitution.<sup>19</sup>

However, "it might be argued that the legislative finding is conclusive upon the question whether an act is exempt from the referendum, but not conclusive on the same question of fact when the courts shall be called upon to consider the validity of the same act." But "it is the same act or law, and it is the same finding. It is a finding that a particular fact in fact exists. It is not a finding that the legislative assembly is of opinion that the

<sup>16</sup> *State v. Stewart* (1920) 57 Mont. 144, 187 Pac. 641, 643, 648. See also *Scott, J., dissenting*, (1916) 62 Colo. 4, 156 Pac. 1108, 1115, 1117, and *Blair, C. J., State v. Becker* (1921) 233 S. W. (Mo.) 641, 652.

<sup>17</sup> *Blair, C. J., State v. Becker* (1921) 233 S. W. (Mo.) 641, 655.

<sup>18</sup> *Blair, C. J., State v. Becker* (1921) 233 S. W. (Mo.) 641, 650, 653. Cf. *State v. Howell* (1915) 85 Wash. 281, 147 Pac. 1162, 1164.

<sup>19</sup> *Blair, C. J., State v. Becker* (1921) 233 S. W. (Mo.) 641, 650, 653.

fact exists, nor a finding that it exists solely with reference to the power to exempt the act from the referendum. . . . Did the people intend that the court should hold the same finding of fact conclusive in one breath, and inconclusive in the next?"<sup>20</sup>

The possibilities of legislative abuse in the absence of judicial restriction are of course very great—possibilities that have too often been realized in actual practice. "The very substance of a constitutional right could be taken from the people by an over-anxious and hostile legislative body. The right here involved is not only constitutional, but one of vital importance and of large proportions. If the courts cannot review the whole measure, and from it determine whether or not lawmakers overstepped the constitutional restrictions in denying the referendum of the measure by their ukase on the subject of 'immediate preservation of peace, health or safety,' then the constitutional referendums become a farce. It becomes a legislative referendum rather than a constitutional referendum, because by a mere false declaration as to 'peace, health, or safety' every measure could be precluded from the constitutional referendum."<sup>21</sup>

On the contrary, it is said that the legislature simply must be trusted—it should not be supposed "that the legislature will disregard its duty, or fail to observe the mandates of the constitution. The courts have no more right to distrust the legislature than it has to distrust the courts. . . . It is true that power of any kind may be abused when in unworthy hands. That, however, would not be a sufficient reason for one co-ordinate branch of the government to assign for attempting to limit the power and authority of another department. If either of the departments, in the exercise of the powers vested in it, should exercise them erroneously or wrongfully, the remedy is with the people, and must be found . . . in the ballot box."<sup>22</sup> Moreover, "it still remains with the people, if they are dissatisfied with a measure, by an initiative petition to cause the same to be submitted to the people at the next general election for the determination as to

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<sup>20</sup> *Ibid.*, 654.

<sup>21</sup> *State v. Sullivan* (1920) 224 S. W. (Mo.) 327, 337.

<sup>22</sup> *Kaddery v. Portland* (1903-4) 44 Ore. 118, 150, 74 Pac. 710, 75 Pac. 222.

See also *Van Kleeck v. Ramer* (1916) 62 Colo. 4, 156 Pac. 1108, 1111.

whether or not such act shall be repealed."<sup>23</sup> But this is rather poor comfort.<sup>24</sup>

A serious practical objection to the judicial review of legislative action in this connection is of course the uncertainty, litigation, and delay that are likely to be caused, and are at times caused, through its operation.<sup>25</sup>

Before the question as to emergency legislation under constitutional provisions for the referendum arose, it was held that under constitutional provisions fixing the time of taking effect of statutes at a certain number of days after enactment, except in case of "emergency," the legislative determination of the existence of an emergency was final.<sup>26</sup> These precedents have been followed by courts that refuse to review the decisions of the legislature under the referendum amendments, without a consideration of the difference in the purpose of the emergency provisions under such amendments, and without a consideration of the significance of the qualifications introduced by the "public peace, health, or safety," etc., additions.

But, from the other point of view, these precedents have no bearing upon the question that arises under the referendum amendments. None of the cases following these precedents, it is said, "grasp the reason or philosophy of the recent change in the fundamental law. They are in step with a tune that is dead. It is no answer to say that courts have always held to a certain rule, for . . . the present condition has not existed heretofore. The first of the adjudged cases did not note the change or rather did

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<sup>23</sup> Oklahoma City v. Shields (1908) 22 Okla. 265, 100 Pac. 559, 576. See also Van Kleeck v. Ramer (1916) 62 Colo. 4, 156 Pac. 1108, 1111; Higbee, J., dissenting; State v. Becker (1921) 233 S. W. (Mo.) 641, 656, 658.

<sup>24</sup> State v. Meath (1915) 84 Wash. 302, 147 Pac. 11, 15; Blair, C. J., State v. Becker (1921) 233 S. W. (Mo.) 641, 651, 654.

<sup>25</sup> Hill, J., Van Kleeck v. Ramer (1916) 62 Colo. 4, 156 Pac. 1108, 1112, 1113; minority opinion, State v. Meath (1915) 84 Wash. 302, 147 Pac. 11, 18, 19.

<sup>26</sup> "In all such cases it is for the legislature to ascertain and declare the fact of the existence of the emergency, and its determination is not reviewable elsewhere. The constitution has vested the lawmaking department of the government with the power to determine that question . . . and such determination is not reviewable in the courts. . . . Such determination is in its nature political, and not judicial, and for such errors, if they be errors, the remedy must be found in the virtue and intelligence of the people. The ballot box is the medium through which they may be corrected." Biggs v. McBride (1889) 17 Or. 640, 647, 21 Pac. 878. See also Carpenter v. Montgomery (1845) 7 Blackf. 415; Wheeler v. Chubbuck (1855) 16 Ill. 361; Iroquois County v. Kelly (1864) 34 Ill. 293; McWhirter v. Brainard (1875) 5 Ore. 426, 429; Day Land and Cattle Co. v. State (1887) 68 Tex. 526, 4 S. W. 865, 872; Orrick v. Fort Worth (1908) 52 Tex. Civ. App. 308, 114 S. W. 677, 683; Roanoke v. Elliott (1918) 123 Va. 393, 96 S. E. 819, 821.

not count it as a change at all, and the others have followed it blindly and with the usual reverence for 'authority.'<sup>27</sup> Under the old form, the legislature was acting under a free license to legislate. The people had reserved no right to review."<sup>28</sup>

Again, courts in this connection have refused to recognize any qualifications that may be implied in the addition of the "public peace, health, or safety," etc., phrases. "The amendment does not declare what shall be deemed laws of the character indicated. . . . The exception in the constitutional amendment is not confined to such laws as the legislature may legally enact by virtue of the police powers of the state, or to those alone that may affect the public peace, health, or safety . . . But the language of the constitutional amendment is broader, and includes all laws, of whatsoever kind, necessary for the immediate preservation of the public peace, health, or safety, whether they . . . come strictly within the police powers, or not."<sup>29</sup>

On the contrary, such additions have been construed to favor the intervention of the courts. "Where there is a declaration in the constitution that no law shall take effect unless in a case of emergency to be declared by the legislature, it may truthfully be said that a court may not review the declaration of the legislature, but where the people have put upon the legislature a limitation in the way of a specific definition of the power and an elimination of acts of a certain character, the rule is that an emergency must conform to the constitutional requirement . . . The declaration is equivalent to saying that the referendum shall not be cut off in any case, except in certain enumerated instances."<sup>30</sup> It was because the unamplified provision had been declared by the courts to be "a stillborn child, a voice dying in the utterance of a command, putting no restraint upon the legislature, and being beyond the range of judicial interference," that the specifications were added; the people intended thus "to mark a line between laws that might be emergent and those which clearly were not; otherwise they would not have changed the words at all;" in this manner power "has been withheld, in so far as a withholding

<sup>27</sup> *State v. Meath* (1915) 84 Wash. 302, 147 Pac. 11, 17.

<sup>28</sup> *Ibid.* 15. See also *Attorney General v. Lindsay* (1914) 178 Mich. 524, 145 N. W. 98; *State v. Stewart* (1920) 57 Mont. 144, 187 Pac. 641, 643; *State v. Sullivan* (1920) 224 S. W. (Mo.) 327, 337.

<sup>29</sup> *Kadderly v. Portland* (1903-4), 44 Ore. 118, 147, 174 Pac. 710, 75 Pac. 222. See also especially *Van Kleeck v. Ramer* (1915) 62 Colo. 4, 156 Pac. 1108, 1110.

<sup>30</sup> *State v. Meath* (1915) 84 Wash. 302, 147 Pac. 11, 12, 17.

can be made by apt and certain words;" there can be "no doubt of the limitations put upon the power of the legislature to declare emergencies or of the courts to sustain them; in the new enactment they have not only fixed the limit, but have restricted it to the primary elements of the police power, the 'health, peace, and safety' of the state . . . certain ground."<sup>31</sup>

Numerous precedents involving various constitutional provisions analogous to those here under discussion have been considered by the courts in the determination of this controversy,<sup>32</sup> and precedents involving other analogous provisions might be added. But the generally prevailing confusion among such precedents has only added to the confusion that has here resulted.

The compromise solution of the problem distinguishes questions of fact from questions of law in this connection, and allots the final determination of the one to the legislature and the other to the courts. "Whether a law is in its substance and effect a law for the preservation of the public peace, health, or safety, or for the support of the state government and its existing institutions, is a question for the courts to decide. . . . Whether an emergency exists which makes it necessary that a law belonging to one of these two classes should go into immediate effect is a question for the legislature."<sup>33</sup>

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<sup>31</sup> Ibid. 14, 15. See also McAlvay, C. J., Attorney General v. Lindsay (1914) 178 Mich. 524, 145 N. W. 98, 102; State v. Howell (1915) 85 Wash. 281, 147 Pac. 1162, 1163; Blair, C. J., State v. Becker (1921) 233 S. W. (Mo.) 641, 651; Scott, J., dissenting, Van Kleeck v. Ramer (1916) 62 Colo. 4, 156 Pac. 1108, 1115, 1118.

<sup>32</sup> Especially provisions prohibiting the enactment of local or special legislation "when a general law can be made applicable"—in most jurisdictions interpreted to favor finality of legislative decision, but with abundant authority to the contrary. "Who is to determine when a law may be local, or when a general law can be properly applied to the particular subject? Most unquestionably those who make the law are necessarily required in its enactment, to judge and determine, from the nature of the subject and the facts relating to it, whether it could properly be made general." Gentile v. State (1868) 29 Md. 409, 410. "If that position be correct, the . . . section has no vitality; nor is there any reason why it should have a place in the constitution. It would impose no restriction upon the action of the legislature, nor confer any power which that body would not possess in the absence of such a provision. If that section permits the legislature to enact a special or local law *ad libitum* . . . the principle involved would deprive this court of all authority to call in question the correctness of a legislative construction of its own powers under the constitution." Thomas v. Clay County (1854) 5 Ind. 4, 7.

<sup>33</sup> Hodges v. Snyder (1920) 43 S. D. 166, 178 N. W. 575, 577. See also State v. Whisman (1915) 36 S. D. 260, 154 N. W. 707, 711; State v. Taylor (1920) 43 S. D. 264, 178 N. W. 985, 986. "Whether the act . . . comes within the exception . . . depends upon the answer to two questions: (1) Does the subject matter of the act bear any reasonable relationship to the public peace or safety? and (2) did there exist such an emergency as rendered it

Theoretically, this distinction certainly removes some difficulties from the situation. But the application of the distinction is difficult, when not impossible, in practice;<sup>34</sup> and this is doubtless the reason why it has not been more often attempted in this connection. Indeed, this controversy throughout is but additional evidence of the truth that the time-honored distinction between "the law" and "the facts" is largely a delusion.<sup>35</sup>

Where the courts will review the legislative decision, it is held that they will not enter into an examination of extrinsic evidence of the facts in the case, but will consider only those matters of which they may take judicial notice. "The utmost that we can take into consideration will be the face of the act itself; the history of the legislation, and contemporary declarations of the legislature . . . and the natural or absurd consequences of any particular interpretation."<sup>36</sup>

This is in accord with the prevailing, though not universal, rule for testing the validity of statutes, ordinances, etc.<sup>37</sup> But the application of the rule may here lead to absurd consequences. "It is sufficient [under this rule] . . . to raise the inquiry of necessity if the legislature merely makes a declaration of emergency. It is manifest, therefore, that facts may exist which will

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necessary that the act be effective immediately? The first is a question of law; the second is a question of fact. The first involves the essential element of an exercise of the legislative power; the second involves the exercise of legislative discretion." Dissenting opinion, *State v. Stewart* (1920) 57 Mont. 144, 187 Pac. 641, 652. See also *Chadwick*, *J.*, *State v. Howell* (1915) 85 Wash. 281, 147 Pac. 1162, 1166; *L. R. A.* 1917-B 15, 28, note. Cf. *Lake View v. Rose Hill Cemetery Co.* (1870) 70 Ill. 191, 195; *Re Morgan* (1899) 26 Colo. 417, 58 Pac. 1071, 1074; *State v. Hammond* (1903) 66 S. C. 219, 44 S. E. 797, 799; *State v. Schofield* (1917) 53 Mont. 502, 165 Pac. 594, 596, in analogous connections.

<sup>34</sup> "The exigency or occasion generally consists entirely in the relation of the measure proposed to the subject acted upon; [in this case, involving the validity of a labor regulation under the police power], the health of the miners forms the subject, the regulation of employment is the measure proposed, the effect of time of labor upon health is the exigency or occasion; and it is difficult upon that basis to distribute the functions of courts and legislatures." *Freund, Police Power*, 134 (1904).

<sup>35</sup> Cf. *Thayer, Treatise on Evidence*, 183 (1898); *Isaacs*, 22 *Columbia Law Review*, 1 (1922).

<sup>36</sup> *State v. Stewart* (1920) 57 Mont. 144, 187 Pac. 641, 649. See also *State v. Meath* (1915) 84 Wash. 302, 147 Pac. 11, 17; *State v. Howell* (1915) 85 Wash. 281, 147 Pac. 1162, 1165; *State v. Howell* (1919) 106 Wash. 542, 181 Pac. 37, 39; *State v. Sullivan* (1920) 224 S. W. (Mo.) 327, 334; *State v. Hinkle* (1921) 198 Pac. (Wash.) 535, 537; *State v. Smith* (1921) 133 N. E. (Ohio) 457, 461; *Graves*, *J.*, *State v. Becker* (1921) 233 S. W. (Mo.) 641, 645, 646.

<sup>37</sup> 12 *C. J.* 787 (1917); 14 *ibid.* 361 (1919); 2 *Dillon, Municipal Corporations* (5th ed.) 941 (1911); 2 *McQuillin, Municipal Corporations* (1911) 1583-5; 7 *ibid.* 6916-20 (1921).

give rise to the necessity of an immediate taking effect of an act which are not expressed on the face of the act, and are not of such public notoriety that the courts may take judicial notice of them. This being true . . . the court . . . may declare acts not to be emergent which are gravely so, and may declare acts to be emergent which have no emergency features whatsoever. . . . The court should either make no inquiry at all, or it should make the inquiry full and complete, even to the taking of testimony when necessary to ascertain the entire truth."<sup>38</sup>

But, nevertheless, a court may know a good deal.<sup>39</sup> "Courts are not supposed to be blinded bats. Of current history courts take judicial knowledge. What all know the courts must judicially know. The current history shows the real purpose of these laws. . . . To say that the purpose of these bills was to protect Missouri in some great, impending emergency relative to her peace, health, or safety, is not only in the face of the bills themselves, but in the face of what her citizens know."<sup>40</sup>

A statement of the facts in the matter by the legislature itself, as is required in some jurisdictions, does not preclude the court that otherwise reviews the legislative decision from taking judicial notice to the contrary; but it may have a conservative influence upon the court.<sup>41</sup>

Under any circumstances, according to the generally accepted view, the presumption is in favor of the validity of the legislative decision.<sup>42</sup> This is the universal rule followed by the courts here-

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<sup>38</sup> Fuller, J., dissenting, *State v. Clausen* (1915) 85 Wash. 260, 148 Pac. 28, 33, 34. Cf. Holcomb, J., dissenting, *State v. Hinkle* (1921) 198 Pac. (Wash.) 535, 538; Marshall, C. J., dissenting, 133 N. E. (Ohio) 457, 461, 464 (1921); 17 *Harvard Law Review*, 269 (1904).

<sup>39</sup> "As cases are decided the list of things of which courts take judicial notice grows." 23 C. J. 59 (1921).

<sup>40</sup> Graves, J., *State v. Becker* (1921) 233 S. W. (Mo.) 641, 645, 646. "What we commonly know as men we cannot unknow as judges." Wanamaker, J., dissenting, *State v. Smith* (1921) 133 N. E. (Ohio) 457, 474, 480.

<sup>41</sup> *State v. Hinkle* (1921) 198 Pac. (Wash.) 535, 537; *State v. Smith* (1921) 133 N. E. (Ohio) 457; and the criticism of Holcomb, J., dissenting, *State v. Hinkle* (1921) 198 Pac. (Wash.) 535.

<sup>42</sup> McClure v. Nye (1913) 22 Cal. App. 248, 133 Pac. 1145, 1147; Brooke, J., *Attorney General v. Lindsay* (1914) 148 Mich. 524, 145 N. W. 98, 103, 104; *State v. Meath* (1915) 84 Wash. 302, 147 Pac. 11, 16; *State v. Howell* (1915) 85 Wash. 281, 147 Pac. 1162, 1164; *State v. Howell* (1915) 85 Wash. 294, 147 Pac. 1159, 1161; *State v. Howell* (1919) 106 Wash. 542, 181 Pac. 37, 39; Hodges v. Snyder (1920) 43 S. D. 166, 178 N. W. 575, 577; *State v. Taylor* (1920) 43 S. D. 264, 178 N. W. 985, 986; *State v. Hinkle* (1921), 198 Pac. (Wash.) 535, 538; *State v. Smith* (1921) 133 N. E. (Ohio) 457; Walker J., *State v. Becker* (1921) 233 S. W. (Mo.) 641, 646, 650; "If there is any section or portion of it of which the court can say there is an emergency", the court will be satisfied. *State v. Hinkle* (1921) 198 Pac. (Wash.) 535, 538.

tofore in testing the validity of legislation in general. But it has been urged, and, with good reason, that, under the change of conditions involved in the adoption of referendum provisions, "the doubt, . . . if any there be, shall be resolved in favor of the people."<sup>43</sup> For it is here not merely a question between the people as makers of the constitution on the one hand and their agent, the legislature, on the other, but also between the people and their agent, both as makers of ordinary law—"two bodies of the same branch of government"—the former of which is normally entitled to overrule the latter. Thus the action of the court in nullifying the legislative exception of laws from the referendum is not simply a negation of a legislative act, but *a negation of a negation of a popular right*, and the presumption should therefore here favor the people rather than the agent of the people.<sup>44</sup>

Perhaps a combination of provisions devised as a protection of the referendum against legislative abuse, and found in some jurisdictions, especially those requiring an extraordinary majority vote in the legislature to declare an emergency, and authorizing the governor to veto the declaration while approving the rest of the bill, might be considered as generally a sufficient protection, without the complications necessarily involved in the judicial review of legislative discretion.<sup>45</sup> And certainly the necessity of emergency legislation, and thus the opportunity for grave abuses, would be greatly reduced by a permanent policy of holding referendum elections as soon as possible after the adjournment of the legislature.

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<sup>43</sup> State v. Stewart (1920) 57 Mont. 144, 187 Pac. 641, 648, 649, 651. See also Johnson, J., dissenting, State v. Smith (1921) 133 N. E. (Ohio) 457, 469, 473.

<sup>44</sup> Cf. State v. Stewart (1920) 57 Mont. 144, 187 Pac. 641, 648; Johnson, J., dissenting, State v. Smith (1921) 133 N. E. (Ohio) 457, 469, 473.

<sup>45</sup> Excess in limitation of emergency *subjects* is conducive to a habit of evasion on the part of the legislature and its condonation by the courts.